

DRAFT Water Court Division Model
8.8.2022 sub-WG edits
For Discussion

WHEREAS, Mont. Const. art. VII, § 1 provides that the “judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law;”

WHEREAS, the legislature possesses the authority to constitute a water court and similarly set forth mechanisms for the appointment and election of judges for said court;

WHEREAS, neither the water court nor its judgeships are mandated or created by the Montana Constitution but are, rather, judgeships maintained by the Montana legislature;

A Bill for an Act entitled: “An Act **Providing for the Continuation of the Montana Water Judges of the Water Divisions**; amending section 3-7-101, 3-7-102, 3-7-103, 3-7-201, 3-7-202, 3-7-203, 3-7-204, 3-7-211, 3-7-212, 3-7-221, 3-7-222, 3-7-223, 3-7-224, 3-7-225, 3-7-301, 3-7-311, 3-7-401, 3-7-402, 3-7-403, 3-7-404, 3-7-501, 3-7-502, 85-2-112, 85-2-114, 85-2-122, 85-2-123, 85-2-125, 85-2-309, 85-2-404, 85-2-405, 85-2-406, 85-5-101, 85-5-102, 85-5-103, 85-5-104, 85-5-105, 85-5-106, 85-5-107, 85-5-108, 85-5-109, 85-5-110, 85-5-111, 85-5-201, 85-5-202, 85-5-203, 85-5-204, 85-5-205, 85-5-206, 85-5-301, 85-5-302, 85-5-401, 85-5-402, 85-5-403, 85-5-404, 85-5-405, 85-5-406, 85-5-407, 85-5-408 and 2-4-702, MCA.”

Be it enacted by the Legislature of the State of Montana:

Definitions:

- (1) “Water Court” The Water Court is comprised of four water division courts that preside over water disputes and controversies as defined in this section that arise within the boundaries of the water division as defined in 3-7-102
- (2) “Water judge” and “Water Division Judge” refers to a judge presiding over any matter in a water division under 3-7-101 and includes a chief water judge or associate water judge.

3-1-901. Judicial vacancy -- notice. (1) (a) Upon receiving notice from the chief justice of the supreme court, the governor shall appoint a candidate, as provided in this part, to fill any vacancy on the supreme court or the district court.

(b) The governor shall appoint a candidate to fill any water judge term or vacancy pursuant to **3-7-221**.

(2) Within 10 days of the date of receipt by the governor of the notice from the chief justice of the supreme court that a vacancy has occurred or the effective date of a judicial resignation has been announced, the governor shall notify the public, including media outlets with general

statewide circulation and other appropriate sources, that a vacancy has been announced, including the deadline within which applications must be received.

3-1-905. Appointments. (1) The governor shall make an appointment within 30 days of the close of the public comment period from the list of applicants.

(2) For purposes of Article VII, section 8, of the Montana constitution, the governor must be construed to receive the names of the nominees at the close of the public comment period provided for in **3-1-904**.

(3) If the governor fails to appoint within 30 days of the close of the public comment period provided for in subsection (1), the chief justice shall make the appointment from the same list of applicants within 30 days of the governor's failure to appoint.

3-7-101. Powers and Duties of Water Courts. The Water Court is comprised of four water division courts that preside over water disputes and controversies as defined in this section that arise within the boundaries of the water division as defined in 3-7-102. The powers and duties of the Water Court are:

- (1) Prior to the issuance of a final decree in a given basin pursuant to 85-2-234 and 235, the Water Court, through its Water Judges appointed pursuant to 3-7-201, shall administer the adjudication of existing water rights in that basin by:
 - (a) coordinating with the department of natural resources and conservation in compiling information submitted on water claim forms under Title 85, chapter 2, part 2, to ensure that the information is expeditiously and properly compiled and transferred to the water judge in each water division; and
 - (b) ensuring that any contested or conflicting claims are tried and adjudicated as expeditiously as possible;
- (2) conduct hearings in cases certified to the district court under 85-2-309;
- (3) conduct proceedings for petitions for judicial review filed with the water court under 2-4-702;
- (4) assign water court personnel to divisions and duties as needed;
- (5) review decisions made by any compact board or other administrative entity as provided pursuant to Title 85, Chapter 20;
- (6) motions brought pursuant to Rule 59 or Rule 60 of Montana Rules of Civil Procedure concerning the adjudication of an existing water right and petitions pursuant to 85-2-234(8);
- (7) disputes arising under the interpretation of a final decree issued under 82-2-234;
- (8) judicial enforcement actions brought pursuant to 85-2-114 and 85-2-122;
- (9) enforcement actions brought pursuant to common law remedies including but not limited to the waste of water, unlawful use of water, or interference with the use of water, including the right to injunctive relief under Title 27, chapter 19;
- (10) Abandonment proceedings raised under 85-2-404 and 85-2-405;
- (11) matters certified under 85-2-309;
- (12) water distribution controversies under 85-2-406;

(13)appointment and supervision of a water commissioner or water mediator under Title 85, chapter 5;

(14)appointment of a water mediator under 85-5-110;

(15)judicial review filed with the water judge under 2-4-702(e)(i);

(16)ditch easement matters ancillary to a water right dispute or controversy, as water right is defined in 85-2-102.

(17)A water division shall be presided over by one or more water judges.

(18)

(a) There is established a single office of the water court that shall be comprised of a water court administrator and all such personnel as may be necessary for the water court administrator to carry out their duties.

(b) The water court administrator shall maintain the records and rulings of all proceedings held by the water judges.

(19)The water court shall promulgate special rules, for the use across all divisions, of practice and procedure and shall prescribe forms for use in connection with this chapter;

(20)Any reference in this chapter to a filing with the water judge means a filing in the office of the water court; and

(21)The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree.

{Internal References to 3-7-101: None}

3-7-102. Water Court boundaries. There are four water divisions whose boundaries are formed by the natural divides between drainages and the borders of the state of Montana and which are described as follows:

(1) The Yellowstone River basin water division consists of those areas drained by the Yellowstone and Little Missouri Rivers and any remaining areas in Carter County.

(2) The lower Missouri River basin water division consists of those areas drained by the Missouri River from below the mouth of the Marias River and any remaining areas in Glacier and Sheridan Counties.

(3) The upper Missouri River basin water division consists of those areas drained by the Missouri River to below the mouth of the Marias River.

(4) The Clark Fork River basin water division consists of the areas drained by the Clark Fork River, the Kootenai River, and any remaining areas in Lincoln County."

{Internal References to 3-7-102:

3-7-101 3-7-501 85-2-102}

3-7-103. Promulgation of rules and prescription of forms -- advisory committee.

(1) As soon as practicable the Montana supreme court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in consultation with the chief water judge and the department of natural resources and conservation.

(2)(a) The chief water judge shall appoint a water adjudication advisory committee to provide recommendations to the water court, the Montana supreme court, the department of

natural resources and conservation, and the legislature on methods to improve and expedite the water adjudication process.

(b) The committee consists of three nongovernmental attorneys who practice before the water court, one district court judge, and three water users who have filed statements of claim with the department of natural resources and conservation under this chapter.

(c) The chief water judge or the judge's designee shall serve as an ex officio member of the committee. The Montana supreme court may appoint the attorney general or the attorney general's designee, a representative from the department of natural resources and conservation, and a representative of the United States government as ex officio members of the committee.

(d) The committee members shall serve at the pleasure of the water court and shall serve without compensation.

(e) The committee shall file a report with the Montana supreme court by October 1, 1996, and as often as determined by the Montana supreme court.

3-7-201. Designation of water judge. (1) One or more water judge must be designated for each water division pursuant to 3-7-221.

(2) For the purposes of 3-1-102, a water judge, when presiding over a water division, is a district court judge in and for each judicial district wholly or partly within the water division.

{Internal References to 3-7-201:

3-7-202 3-7-203 3-7-501}

3-7-202. Term of office. Upon election pursuant to 13-14-212, the term of a water judge is six years."

{Internal References to 3-7-202: None}

3-7-203. Vacancies. (1) If a vacancy in the office of water judge occurs, it must be filled in the manner provided in 3-1-901(b).

(a) Each appointment must be confirmed by the senate. An appointment made while the senate is not in session is effective until the end of the next regular legislative session.

(b) Prior to the issuance of all final decrees pursuant to 85-2-234 and 235, and after appointment and confirmation, a water judge is subject to state-wide retention election to be held on the next general election day in an even-numbered year pursuant to 13-14-212.

(c) After the issuance of all final decrees pursuant to 85-2-234 and 235, and after appointment and confirmation, a water judge is subject to retention election to be held on the next general election day in an even-numbered year within his or her assigned water division pursuant to 13-14-212.

3-7-204. Supervision and administration by supreme court.

(1) The Montana supreme court shall supervise the activities of the water judges and associated water court personnel in implementing this chapter and Title 85, chapter 2, part 2.

(2) The supreme court shall pay the salaries and expenses of the water judges and associated water court personnel.

- (3) The water judges must receive the same salary and expense allowance as provided for district judges in 3-5-211.
- (4) (a) The office of the Water Court must be at the location designated by the chief justice of the Montana supreme court. The Montana supreme court shall provide in its budget for the salary, expenses, and office and staff requirements of the water judges. Money may be appropriated by the legislature from the general fund for these purposes.
(b) Any reference in this chapter to a filing with the water judge means a filing in the office of the Water Court."

3-7-211. Appointment of water commissioners. (1) Except as provided in 85-20-1902, the water judge having jurisdiction over the water division in which the controversy arises may appoint and supervise a water commissioner as provided for in Title 85, chapter 5.

(2) Upon receiving a petition for a water commissioner under Title 85, chapter 5, that:

(a) seeks the appointment of a water commissioner that would act wholly within a single judicial district, and

(b) wherein the petition requests to have the district court judge appoint and supervise a water commissioner;

the water judge having jurisdiction over the water division in which the judicial district is situated may transfer the petition to the applicable district court judge who shall be sitting as a water division judge protempore in that matter.

3-7-211. Appointment of water commissioners. *alternative language

- (1) Except as provided in 85-20-1902, the water judge having jurisdiction over the water division in which a water distribution controversy arises may appoint and supervise a water commissioner as provided for in Title 85, chapter 5.
- (2) Upon receiving a petition for a water commissioner under Title 85, chapter 5, that requests to have the district court appoint and supervise a water commissioner; the water judge having jurisdiction over the water division in which the judicial district is situated shall transfer the petition to the applicable district court.
- (3) If a petition seeking judicial district court supervision requests a scope for water right enforcement that covers more than one judicial district, the presiding judges shall conference and jointly determine how to handle administrative duties related to water commissioner supervision. Should a controversy arise, Title 25, Chapter 2 shall determine proper venue for resolution.
- (4) If a petition to appoint a water commissioner(s) is contested by proper objection, the court requested in the petition may hear the objection.
- (5) If more than one petition is timely filed, seeking the division water court and judicial district court(s) for supervision respectively, the petition with the most support per the statutory requirements of Section 85-5-101, MCA shall determine the court to conduct any hearings on the petitions.

3-7-212. Enforcement of decrees. The water judge having jurisdiction over the applicable water division shall enforce the provisions of a final decree within that water division. In the

absence of any final decree having been issued, the water judge having jurisdiction over the water division may enforce the provisions of a temporary preliminary decree, preliminary decree, or supplemental preliminary decree entered under 85-2-231, as modified by a water judge after objections and hearings."

{Internal References to 3-7-212: None}

3-7-221. Appointment of water judges -- terms of office. (1) Prior to the issuance of all final decrees pursuant to 85-2-234 and 235:

(a) Water judges serving upon [the effective date of this Act] shall serve the remainder of their term in the divisions to which they are assigned, regardless of residency. Upon expiration of their terms, the governor shall fill the vacancies in accordance with 3-7-203.

(b) The governor may appoint additional water judges.

(c) In order to exercise their duties in section 3-7-101(1), the governor may assign each water Judge to one or more water divisions, regardless of residency.

(d) The governor shall designate 1 water judge to be the chief water judge.(2) After the issuance of all final decrees pursuant to 85-2-234 and 235:

(a) The governor shall assign sitting water judges to a division of the governor's choosing for the remainder of their term.

(b) The governor shall appoint at least 1 additional water judge to each of the remaining water divisions. The governor may appoint additional water judges to any division as needed thereafter.

(c) The governor shall designate 1 water judge to be the chief water judge.

(d) Water judges need not be a resident of the water division of which the judge is appointed at the time of appointment, but after appointment, the water judge must reside in the water division for which the judge is appointed during the judges' term of office.

(3) To be eligible for the office of water judge, a person shall have the qualifications for district court or supreme court judges found in Article VII, section 9, of the Montana constitution.

3-7-222. Salary -- office space.

(Terminates XXX)

3-7-223. Duties of chief water judge. The duties of the chief water judge shall be to provide for the efficient management of the water divisions court business in cooperation with the other water judges and the water court administrator

" {Internal References to 3-7-223:

3-7-225}

3-7-224. Jurisdiction of chief water judge and associate water judges. (1) Prior to the issuance of all final decrees pursuant to 85-2-234 and 235, the existing chief water judge and the associate water judge may, at the discretion of the chief justice of the Montana supreme court, also serve as water judge for one or more of the water divisions if so appointed by the chief justice of the Montana Supreme court pursuant to 3-7-221(1).

(2) After issuance of all final decrees pursuant to 85-2-234 and 235, all water judges must be appointed pursuant to 3-7-201(2).

(Terminates XXX)

"3-7-301. Appointment and removal of water masters. The water judge in each water division may appoint one or more water masters when enacting the duties of 3-7-101(1).

(1) In appointing a water master, a water judge shall consider a potential master's experience with water law, water use, and water rights.

(2) A water master shall serve at the pleasure of the water judge who appointed the water master and may be removed by the water judge.

3-7-311. Duties of water masters. (1) The water master has the general powers given to a master by Rule 53(c), M.R.Civ.P.

(2) Within a reasonable time after June 30, 1983, the water master shall issue a report to the water judge meeting the requirements for the preliminary decree as specified in 85-2-231.

(3) After a water judge issues a preliminary decree, the water master shall assist the water judge in the performance of the water division's further duties as ordered by the water judge.

{Internal References to 3-7-311: None}

3-7-401. Definitions. For the purposes of this part, the following definitions apply:

(1) "Fiduciary" includes such relationships as executor, administrator, trustee, or guardian.

(2) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(a) ownership in a mutual or common investment fund that holds securities is not a financial interest in such securities unless the judge or water master participates in the management of the fund;

(b) an office in an educational, religious, charitable, fraternal, or civic organization is not a financial interest in securities held by the organization;

(c) the proprietary interest of a policyholder in a mutual insurance company or a depositor in a mutual savings association or a similar proprietary interest is a financial interest in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(d) ownership of government securities is a financial interest in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(3) "Proceeding" includes any prehearing, hearing, appellate review in any matter conducted by the water master, water judge pro tempore, or a water judge.

{Internal References to 3-7-401: None}

3-7-402. Disqualification of water judge or master. (1) A water judge may withdraw or may disqualify the water master in any proceeding or pertinent portion of a proceeding in which the judge's or the water master's impartiality might reasonably be questioned.

(2) A water judge may also withdraw or may disqualify the water master in the following circumstances:

(a) if the judge or the water master has a personal bias or prejudice concerning a party of personal knowledge or disputed evidentiary facts concerning the proceeding;

(b) if in private practice the judge or the water master served as a lawyer in the matter in controversy or a lawyer with whom the judge or the water master previously practiced law served during the association as a lawyer concerning the matter or the judge or the lawyer has been a material witness concerning it;

(c) if the judge or the water master has served in governmental employment and in that capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(d) if the judge or the water master knows that the judge or the water master, individually or as a fiduciary, or the judge's or the water master's spouse or minor child residing in the judge's or the water master's household has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding; or

(e) if the judge or the water master or the judge's or the water master's spouse or a person within the third degree of relationship to any of them (as calculated according to 72-11-101 through 72-11-104) or the spouse of such a person:

(i) is a party to the proceeding or an officer, director, or trustee of a party;

(ii) is known by the judge or water master to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's or water master's knowledge likely to be a material witness in the proceeding.

(3) A water judge should be informed about the judge's and the water master's personal and fiduciary financial interests and make a reasonable effort to be informed about the personal financial interests of the judge's and the water master's spouse and minor children residing in the judge's or the water master's respective household.

{Internal References to 3-7-402: None}

3-7-403. Waiver of disqualification. A water judge may accept from the parties to the proceeding a waiver of any ground for disqualification if it is preceded by a full disclosure on the record of the basis for disqualification."

{Internal References to 3-7-403: None}

3-7-404. Procedure exclusive. The procedure for disqualification of a water judge or water master specified in this section is exclusive unless otherwise specifically altered by the Montana supreme court."

{Internal References to 3-7-404: None}

3-7-501. (Water Court Jurisdiction). (1) The Water Court has exclusive jurisdiction of the determination and interpretation of cases and controversies under 3-7-101, except as otherwise provided for.

(2) The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree.

{Internal References to 3-7-501: None}

3-7-502. Jurisdictional disputes. Whenever a question arises concerning which water judge shall preside over a case that could be heard in more than one water divisions, the question shall be settled by the chief water judge."

{Internal References to 3-7-502: None}

85-2-112. Department duties. The department shall:

(1) enforce and administer this chapter and rules adopted under 85-2-113, subject to the powers and duties of the supreme court under 3-7-204;

(2) prescribe procedures, forms, and requirements for applications, permits, certificates, claims of existing rights, and proceedings under this chapter and prescribe the information to be contained in any application, claim of existing right, or other document to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, claims of existing rights, applications, and other documents filed in its office under this chapter;

(4) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

(5) upon request by any person, cooperate with, assist, and advise that person in matters pertaining to measuring water or filing claims of existing rights with the water divisions court under this chapter;

(6) adopt rules necessary to reject, modify, or condition permit applications in highly appropriated basins or subbasins as provided in 85-2-319."

{Internal References to 85-2-112:

15-7-308}

85-2-114. Judicial enforcement. (1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may petition the water courtto:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use;

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference; or

(c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

(2) Upon the issuance of an order or injunction, the department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin the waste, unlawful use, interference, or violation.

(4) The county attorney or the attorney general may bring suit to enjoin the waste, unlawful use, interference, or violation or bring an action under 85-2-122(1) without being requested to do so by the department.

(5) A county attorney who takes action pursuant to subsection (3) or (4) may request assistance from the attorney general.

(6) When enforcing the provisions of this section, the department, the county attorney, and the attorney general shall give priority to protecting the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation.

(7) After considering the provisions of subsection (6), the department may attempt to obtain voluntary compliance through warning, conference, or any other appropriate means before petitioning the [water divisions](#) court under subsection (1). An attempt to obtain voluntary compliance under this subsection must extend over a period of at least 7 days and may not exceed 30 working days.

(8) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation.

(9) The provisions of this section do not limit a water right owner from seeking relief, including injunctive relief, in [the water divisions](#) court under Title 27, chapter 19, or this chapter."

{Internal References to 85-2-114:

*3-7-311 44-4-1101 44-4-1102 85-2-122
85-2-381 85-2-427}*

85-2-122. Penalties. (1) Except as provided in 85-2-410(6), a person who violates or refuses or neglects to comply with the provisions of 85-2-114, any order of the department, or any rule of the department is subject to a civil penalty not to exceed \$1,000 per violation. Each day of violation constitutes a separate violation.

(2) Except as provided in subsection (3), fines collected by the department or [the water divisions](#) court under subsection (1) must be deposited in the account established in 85-2-318 for use by the department in the enforcement of 85-2-114.

(3) If a fine is collected by an independent action brought by:

(a) the county attorney, the fine must be deposited in the general fund of the county; or

(b) the county attorney with assistance from the attorney general or by the attorney general, the fine must be deposited in the water right enforcement account created in 44-4-1101 and must be used to enforce the provisions of 85-2-114."

{Internal References to 85-2-122:

*44-4-1101 85-2-114 85-2-123 85-2-381
85-2-427 85-20-1001}*

85-2-123. Deposit of fees and penalties. Except as provided in 85-2-122 and 85-2-124, all fees and penalties collected under this chapter must be deposited in the water right appropriation account established in 85-2-318.."

{Internal References to 85-2-123: None}

85-2-125. Recovery of costs and attorney fees by prevailing party. (1) If a final decision of the department on an application for a permit or a change in appropriation right is appealed to the water court, said court may award the prevailing party reasonable costs and attorney fees.

(2) The party obtaining injunctive relief in an action to enforce a water right must be awarded reasonable costs and attorney fees. For the purposes of this section, "enforce a water right" means an action by a party with a water right to enjoin the use of water by a person that does not have a water right."

{Internal References to 85-2-125: None}

85-2-309. Hearings on objections -- jurisdiction. (1) If the department determines that an objection to an application for a permit under 85-2-311 or change in appropriation right under 85-2-402 states a valid objection, it shall hold a contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 90 days from the date set by the department for the filing of objections after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the water divisions court for determination by a water judge under subsection (2). The department may consolidate hearings if more than one objection is filed to an application. The department may extend the 90-day deadline for good cause shown or upon request of the applicant and all objectors. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the water divisions court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water judge over all other adjudication matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to 85-2-316 or 85-2-322."

{Internal References to 85-2-309:

3-7-101 3-7-223 3-7-224 3-7-501

*3-7-502 85-2-102 * 85-2-314 * 85-2-316 **

*85-2-322 85-2-402 85-2-436 * 85-20-1901 *}*

85-2-404. Abandonment of appropriation right. (1) If an appropriator ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions;

the appropriation right is, to that extent, considered abandoned and must immediately expire.

(2) If an appropriator ceases to use all or part of an appropriation right or ceases using the appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for use, there is a prima facie presumption that the appropriator has abandoned the right for the part not used.

(3) If an appropriator ceases to use all or part of an appropriation right in compliance with a candidate conservation agreement initiated pursuant to 50 CFR 17.32 or because the land to which the water is applied to a beneficial use is contracted under a state or federal conservation set-aside program:

(a) the set-aside and resulting reduction in use of the appropriation right does not represent an intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the terms and conditions attached to the right; and

(b) the period of nonuse that occurs for part or all of the appropriation right as a result of the contract may not create or may not be added to any previous period of nonuse to create a prima facie presumption of abandonment.

(4) The lease of an existing right pursuant to 85-2-436 or a temporary change in appropriation right pursuant to 85-2-407 or 85-2-408 does not constitute an abandonment or serve as evidence that could be used to establish an abandonment of any part of the right.

(5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined in accordance with part 2 of this chapter."

{Internal References to 85-2-404:

85-2-402 85-2-405}

85-2-405. Procedure for declaring appropriation rights abandoned. (1) When the department has reason to believe that an appropriator may have abandoned an appropriation right under 85-2-404 or when another appropriator in the opinion of the department files a valid claim that the appropriator has been or will be injured by the resumption of use of an appropriation right alleged to have been abandoned, the department shall petition the water court that determined the existing rights in the source of the appropriation in question to hold a hearing to determine whether the appropriation right has been abandoned.

(2) A affected water user may petition the water divisions court to hold a hearing to determine whether a water right has been abandoned under 85-2-404.

(3) Proceedings under this section must be conducted in accordance with the Montana Rules of Civil Procedure, and appeal must be taken in accordance with the Montana Rules of Appellate Procedure.

(4) At the hearing, the initial burden of proof is on the petitioner, which shall establish by a preponderance of the evidence that the appropriation has been abandoned under 85-2-404.

(5) The determination that the water right is abandoned shall include an order to the Department to update its centralized records system." ~~of the court must be appended to the final decree.~~ The department shall keep a copy of the determination in its office in Helena."

{Internal References to 85-2-405: [85-2-112](#) None}

85-2-406. [Water court supervision of water distribution.](#) [Subject to applicable provisions of Title 85, Chapter 20,](#) (1) [the](#) water court shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners [concerning a water distribution controversy.](#) The supervision must be governed by the principle that first in time is first in right. (2) (a) [The water](#) court may order the distribution of water pursuant to [the terms of the applicable governing decree, and by the terms of any applicable certificate of water right, permit, state water reservation, compact, or change in appropriation right. A decree](#) entered prior to July 1, 1973 [is enforceable as to the valid claims filed pursuant to 85-2-221 that are based upon an existing right contained in such decree,](#) until an enforceable decree is entered under part 2 of this chapter, or the [applicable existing rights](#) have been adjudicated under [as](#) set forth in subsections (2)(b), [\(3\), or \(4\).](#) (b)(i) When a water distribution controversy arises upon a source of water in which not all existing rights have been conclusively determined according to part 2 of this chapter, any party to the controversy may petition the [water court](#) [for a](#) determination of the existing rights that are involved in the controversy according to part 2 of this chapter. (ii) [The presiding water judge](#) shall retain exclusive jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water rights [under this subsection.](#) (iii) Controversies [arising under this subsection](#) must be given priority over all other adjudication matters. (iv) After determination of the matter, the water [court](#) shall [issue a](#) decision, with a tabulation or list of the existing rights and their relative priorities [that are subject to the water distribution controversies.](#) (3) A controversy between appropriators [concerning a water right](#) that has been the subject of a final decree under part 2 of this chapter must be settled by the [water judge presiding over the applicable water division.](#) The order of the [water judge](#) settling the controversy may not alter the [water rights](#) except to the extent the court alters rights based upon abandonment, waste, or illegal enlargement or change of right. The order settling the controversy [shall include an order to the Department to update its centralized records system for any altered water right.](#) The department must be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding. (4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree or preliminary decree, as modified after [any](#) objections [or](#) hearings, is enforceable and administrable according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the [chief](#) water judge shall upon referral from the [water judge of the applicable water division](#) establish, in a form determined to be appropriate by the [chief](#) water judge, one or more tabulations or lists of all existing rights and their relative priorities. (5) A person whose existing rights and priorities are determined in a temporary preliminary decree or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter may appeal a determination made pursuant to subsection (2)." {Internal References to 85-2-406: 3-1-804 85-2-344 85-20-1001}

85-5-101. [Appointment of water commissioners.](#) [Subject to applicable provisions set forth in Title 85, Chapter 20,](#) (1) Whenever the rights of persons to use the waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply have been determined by a decree of a court of competent jurisdiction, including temporary preliminary,

preliminary, and final decrees issued by a water judge, it is the duty of the water judge of the applicable water court having jurisdiction, upon the application of the owners of at least 15% of the water rights affected by the decree or at least 15% of the flow rate of the water rights affected by the decree and after reasonable notice of the petition and an opportunity to comment given to all affected water users, in the exercise of the water judge's discretion, to appoint one or more commissioners. The commissioners have authority to admeasure and distribute to the parties owning water rights in the source affected by the decree the waters to which they are entitled, according to their rights as fixed by the decree and by any certificates, permits, and changes in appropriation right issued under chapter 2 of this title.

(a) When petitioners make proper showing that they are not able to obtain the application of the owners of at least 15% of the water rights affected or at least 15% of the flow rate of the water rights affected and they are unable to obtain the water to which they are entitled, the water judge of the applicable water division having jurisdiction may appoint a water commissioner.

(b) Upon application by any interested person in accordance with 3-1-804, the water judge of the applicable water court may appoint the applicable district court judge to sit as the water judge supervise the water commissioner.

(2) When the existing rights of all appropriators from a source or in an area have been determined in a temporary preliminary decree, preliminary decree, or final decree issued under chapter 2 of this title, the water judge of the applicable water court may, upon application by both the department of natural resources and conservation and one or more holders of valid water rights in the source, appoint a water commissioner. The water commissioner shall distribute to the appropriators, from the source or in the area, the water to which they are entitled. Upon application by any interested person in accordance with 3-1-804, the water judge of the applicable water court may appoint the applicable district court judge to supervise the water commissioner.

(3) The department of natural resources and conservation or any person or corporation operating under contract with the department or any other owner of stored waters may petition the water judge of the applicable water court to have stored waters distributed by the water commissioners appointed by the water court. The water court may order the court appointed commissioner or commissioners to distribute stored water when and as released to water users entitled to the use of the water. Upon application by any interested person in accordance with 3-1-804, the water judge of the applicable water court may appoint the applicable district court judge to supervise the water commissioner.

(4) At the time of the appointment of a water commissioner or commissioners, the water divisions court shall fix their compensation, require a commissioner or commissioners to purchase a workers' compensation insurance policy and elect coverage on themselves, and require the owners and users of the distributed waters, including permittees, certificate holders, and holders of a change in appropriation right, to pay their proportionate share of fees and compensation, including the cost of workers' compensation insurance purchased by a water commissioner or commissioners. The water judge may include the department in the apportionment of costs if it applied for the appointment of a water commissioner under subsection (2).

(5) Upon the application of the board or boards of one or more irrigation districts entitled to the use of water stored in a reservoir that is turned into the natural channel of any stream and withdrawn or diverted at a point downstream for beneficial use, the water judge of the

applicable water court where the most irrigable acres of the irrigation district or districts are situated may appoint a water commissioner to equitably admeasure and distribute stored water to the irrigation district or districts from the channel of the stream into which it has been turned. A commissioner appointed under this subsection has the powers of any commissioner appointed under this chapter, limited only by the purposes of this subsection. A commissioner's compensation is set by the appointing **water** judge and paid by each district and other users of stored water affected by the admeasurement and distribution of the stored water. In all other matters, the provisions of this chapter apply so long as they are consistent with this subsection.

(6) A water commissioner appointed by a **water** court is not an employee of the judicial branch, a local government, or a water user.

(7) A water commissioner who fails to obtain workers' compensation insurance coverage required by subsection (4) is precluded from receiving benefits under Title 39, chapter 71, as a result of the performance of duties as a water commissioner."

{Internal References to 85-5-101:

85-2-381 85-5-102 85-20-1001}

85-5-102. Appointment of chief commissioner. When the **water** judge of the **water** court appoints two or more commissioners to admeasure and distribute the waters mentioned in 85-5-101, the **water** judge may appoint one of them as chief commissioner and empower the chief commissioner to exercise direction and control over the other commissioners in the discharge of their duties. The **water** judge may depose the person appointed as chief commissioner from that position and appoint another as chief commissioner whenever it appears to the **water** judge that better service may be given to the water users by making the change."

{Internal References to 85-5-102: None}

85-5-103. Oath and bond. Each water commissioner appointed by the court shall subscribe and file with the **water court administrator** of the **water** court an oath of office before commencing the discharge of duties as commissioner and shall file with the **water court administrator** a bond executed by the commissioner, with two or more sureties, in a sum that the **water** judge may designate, to ensure the faithful discharge of the commissioner's duties."

{Internal References to 85-5-103: None}

85-5-104. Term of office. A water commissioner holds office for the time during the irrigation season of each year that may be designated by the **water** judge in the order making the appointment. The **water** judge may fix the date of the commencement of the term and may, in the judge's discretion or when requested in writing by at least three persons entitled to the use of the waters, change the term for closing of the commissioner's service."

{Internal References to 85-5-104: None}

85-5-105. Power and duty to distribute water. Upon the issuance of an order, the water commissioner or commissioners have authority and it is the commissioner's or commissioners' duty to admeasure and distribute to the users of water, as their interests may appear and be required, the stored and supplemental water stored and as released by the department of

natural resources and conservation under provisions of Title 85, chapter 1, to be diverted into and through a stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply in the same manner and under the same rules as decreed water rights are admeasured and distributed. The water commissioner or commissioners and the owners and users of the stored and supplemental water are bound by and are subject to the provisions of this chapter. However, the admeasurements and distribution of the stored and supplemental water may not interfere with decreed water rights. The purpose of Title 85, chapter 5, parts 1 through 3, is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters."

{Internal References to 85-5-105: None}

85-5-106. Maintenance and repair of ditches or systems. Upon written request of the owners of at least 51% of the water rights in any adjudicated ditch or single water system, the water judge of the applicable water court may empower the commissioner to maintain and keep in reasonable repair such water ditch or water system at the expense of the owners thereof, and for such purposes the commissioner shall have authority to enter and work upon any ditch, canal, aqueduct, or other source of conveying the waters affected by the decree and the right-of-way thereof and to visit, inspect, and adjust all headgates or other means of distribution of such waters."

{Internal References to 85-5-106: None}

85-5-107. Record of distribution of water. (1) Each water commissioner shall keep a daily record, unless a different recording schedule is ordered by the water judge, of the amount of water distributed to each water user and shall file a summary of the record with the water court administrator of the water court monthly or seasonally, at the discretion of the water judge during the judge's term of service. The report must show in detail the total amount of water distributed to each water user during the month or the season and the cost of distributing the water, based upon the water commissioner's or commissioners' daily salary, other costs of the water commissioner or commissioners approved by the water judge, and the proportionate amount of water distributed. When two or more water commissioners serve under the same decree or decrees by order of the water judge, they may file a joint summary of their records with the water court administrator of the water court, or the chief commissioner, if one has been appointed by the water judge, may file a summary on behalf of all of them.

(2) If the water judge determines that it is necessary to establish a billing cycle prior to a distribution season, as provided in 85-5-204, the report or reports must serve as the basis for the amounts billed."

{Internal References to 85-5-107:

85-5-201 85-5-204}

85-5-108. Authority and arrest power. For the purposes of carrying out the provisions of Title 85, chapter 5, parts 1 through 3, each commissioner appointed by the court has the authority to enter upon any ditch, canal, aqueduct, or other source for conveying the waters affected by the decree and to visit, inspect, and adjust all headgates or other means of distributing the waters

and has the same powers as a sheriff or constable to arrest any person interfering with the distribution made by the commissioner, to be dealt with according to law."

{Internal References to 85-5-108: None}

85-5-109. Failure to perform duty as contempt of court. If a commissioner fails to perform any of the duties imposed upon the commissioner by the order of the water judge of applicable water court, the commissioner is guilty of contempt of court."

{Internal References to 85-5-109: None}

85-5-110. Appointment of water mediators -- duties. (1) Except as provided in 85-20-1902 and subject to applicable provisions set forth in Title 85, Chapter 20, the water judge of the water court may appoint a water mediator to mediate a water controversy in a decreed or non decreed basin under the following circumstances:

(a) upon request of the governor;
(b) upon petition by at least 15% of the owners of water rights in a decreed or non decreed basin; or

(c) in the discretion of the water judge of the applicable water court having jurisdiction.

(2) A water mediator appointed under this section may:

(a) discuss proposed solutions to a water controversy with affected water right holders;
(b) review options related to scheduling and coordinating water use with affected water right holders;

(c) discuss water use and water needs with persons and entities affected by the existing water use;

(d) meet with principal parties to mediate differences over the use of water; and

(e) hold public meetings and conferences to discuss and negotiate potential solutions to controversies over use of water.

(3) If the governor requests or a state agency petitions for a water mediator, the governor or agency shall pay all or a majority of the costs of the water mediator as determined equitable by the water judge of the applicable water court having jurisdiction.

(4) The governor may use funds appropriated under 75-1-1101 to pay the costs of a water mediator.

(5) This section does not allow a water mediator to require any valid water right holder to compromise or reduce any of the holder's existing water rights.

(6) If an appropriator voluntarily ceases to use all or part of an appropriation right or voluntarily ceases to use an appropriation right according to its terms and conditions as a result of the efforts of a mediator appointed under this section, the appropriator may not be considered to have abandoned all or any portion of the appropriation right."

{Internal References to 85-5-110: None}

85-5-111. Water commissioner and mediator education. (1) The department of natural resources and conservation, in cooperation with the Montana supreme court, the water court, the Montana university system, and other appropriate state, tribal and federal agencies, shall develop an educational program for water commissioners and mediators that includes:

- (a) an annual seminar on commissioner and mediator duties, mediation techniques, and water measuring techniques;
 - (b) preparation and, as necessary, revision of a water commissioner and mediator manual; and
 - (c) an outreach program that identifies persons who might serve as water commissioners or mediators.
- (2) Unless the water judge of the applicable water court having jurisdiction determines otherwise, a water commissioner appointed pursuant to 85-5-101 shall complete at least one educational program as provided in subsection (1) prior to administering water."
- {Internal References to 85-5-111: None}*

85-5-201. Distribution of water and related expenses. (1) Each water commissioner appointed by the water judge of the applicable water court for the purpose of distributing water has the authority to determine the appropriate quantity and distribute to the parties interested, under a decree, permit, certificate, or change in appropriation right, the water to which those who are parties to the decree or holders of a permit, certificate, or change in appropriation right, or privy to a permit, certificate, or change in appropriation right, are entitled, according to their priority as established by the decree, permit, certificate, or change in appropriation right.

(2) The water commissioner may incur necessary expenses in the making of headgates or dams for the distribution of the waters if the parties fail or refuse to do so. Expenses associated with making headgates or dams for the distribution of water must be assessed against and paid by the party or parties for whom the ditch or ditches were repaired or the dams or headgates were made. In the discretion of the court, the costs or expenses may be assessed against the land upon which or for the benefit of which the expense had been incurred.

(3) (a) At the water court's discretion, a water commissioner may bill water users prior to the beginning of a distribution season for the purpose of offsetting costs associated with distributing water and water commissioner duties by submitting the information necessary for the billing to the water court administrator of the water court. A billing issued prior to the beginning of a distribution season:

- (i) must be assessed on a per-user basis;
- (ii) must be based on the report provided for in 85-5-107 for the prior year; and
- (iii) may not exceed 80% of the amount that was provided to the water court pursuant to 85-5-107 for the prior distribution season on a per-user basis.

(b) Upon receipt of the information from the water commissioner, the water court administrator of water court shall proceed as provided in 85-5-204."

{Internal References to 85-5-201: None}

85-5-202. Repair expenses. The water judge may allow as a charge any expenses necessarily incurred by the water commissioner in the discharge of duties in the employment of extra labor for the repair of dams, headgates, ditches, or flumes when immediate action is necessary to preserve the rights of the parties entitled to the waters of a stream or when the water judge has, in the order appointing the commissioner, required the commissioner to repair ditches and keep in repair necessary headgates, ditches, or flumes. The water commissioner shall report all expenses, and the cost must be taxed against the party or parties for whose benefit the expenses were incurred. In the discretion of the court, the costs or expenses may be assessed against the land upon which or for the benefit of which the expense had been incurred."

{Internal References to 85-5-202: None}

85-5-203. Telephone expenses. The [water](#) judge may also allow as a charge reasonable expenses incurred by a water commissioner in telephoning to the [water](#) judge for instructions in cases of emergency. When there are two or more commissioners acting under the [water](#) judge's order, reasonable expenses incurred in communicating with each by telephone or with the [water](#) judge of the [water](#) court, in order to carry on the distribution of the waters harmoniously and in accordance with the decree, shall be deemed a necessary expense. These expenses shall be reported by the water commissioner or commissioners at the close of the season and shall be taxed against all the water users affected by the decree or decrees ratably in proportion to the whole amount of water distributed to them during the season."

{Internal References to 85-5-203: None}

85-5-204. Apportionment of fees and expenses. (1) Upon the filing of the report by the water commissioner or water commissioners, the [water court administrator](#) of [the water](#) court shall notify by letter each person mentioned in the report:

- (a) of the amount the water user is made liable for by the report;
 - (b) that objections to the report and the amount taxed against the water user may be made by any person interested in the report or the amount assessed against the water user within 20 days after the date of the mailing of the notice; and
 - (c) that, unless objections are filed, an order will be made by the [water](#) judge of the [water](#) court finally fixing and determining the amount due from each of the water users.
- (2) The affidavit of the [water court administrator](#) that the [water court administrator](#) has mailed a notice to each person mentioned in the report at the person's last-known post-office address, in the usual manner, must be considered prima facie evidence that the person received the notice provided for in this section.
- (3) At the discretion of the [water](#) judge, the water commissioner may issue a bill prior to the beginning of a distribution season for the purpose of offsetting costs associated with distributing water and water commissioner duties by submitting the information necessary for the billing to the [water court administrator](#) of the [water](#) court. The bill for each water user may not exceed 80% of the amount that was provided to the [water](#) court pursuant to 85-5-107 for the prior distribution season.
- (4) If the cost of distributing water during a distribution season is less than the amount that was collected through a bill issued prior to a distribution season, the water commissioner shall refund the money to the water user based on the amount of water that the water user received during the distribution season. The water commissioner shall submit a refund report, along with proof that any refunds were issued, to the [water court administrator](#) of [water](#) court for filing."

*{Internal References to 85-5-204:
85-5-107 85-5-201}*

85-5-205. Objections to expenses -- hearing. At the expiration of the 20 days' notice, as provided for in the preceding section, if objections to said report have been filed or a motion to retax the same has been made, the [water](#) judge shall fix a time for the hearing of such objections or motion to retax, which time of hearing shall be as soon as the [water](#) judge can

conveniently hear the same. Any person objecting to said report shall be entitled to at least 5 days' notice of the date and time of such hearing. At such hearing the [water](#) judge shall hear and determine the motion or objections and shall make an order fixing and determining the amount found due from each of said water users to such commissioner or commissioners. In case no objections are filed within the 20 days, as hereinbefore provided for, such order shall be made as a matter of course, and in either case said order shall be final determination of the matter."

{Internal References to 85-5-205: None}

85-5-206. Effect of order fixing fees. After the order of the [water](#) court fixing the fees and compensation and expenses of the water commissioner is final, the order has the force and effect of a judgment against the person to whom the water was or will be distributed and for whose benefit it was used or will be used. When the expenses of a commissioner or commissioners has been assessed against the land for which the service of the commissioner or commissioners has been rendered, the assessment is a lien against the land. The lien has the same effect as a judgment. The lien may be executed in the same manner as a judgment upon order of the [water](#) court. The water commissioner, at the water commissioner's discretion, may withhold further determinations of quantity or distribution of water to any person entitled to the water until the person has paid all fees, compensation, and expenses of the water commissioner or commissioners fixed by the court and apportioned and charged to the person, including bills sent prior to the beginning of a distribution season. The commissioner may withhold the determination of quantity and distribution of water from any land against which there exists any lien that is the result of lack of payment pursuant to this section until the lien has been fully discharged."

{Internal References to 85-5-206: None}

85-5-301. Complaint by dissatisfied user. (1) A person owning or using any of the waters of the stream or ditch or extension of the ditch who is dissatisfied with the method of distribution of the waters of the stream or ditch by the water commissioner or water commissioners and who claims to be entitled to more water than the person is receiving or to a right prior to that allowed the person by the water commissioner or water commissioners may file a written complaint, duly verified, setting forth the facts of the claim [in the applicable water court](#).

(2) Upon receipt of the complaint, the [complaint shall be assigned by the chief water judge to a judge who is not supervising the water commissioner against whom the complaint is filed](#). [The assigned judge](#) shall fix a time for the hearing of the petition and shall direct that notice be given to the parties interested in the hearing as the [water](#) judge considers necessary. At the time fixed for the hearing, the [water](#) judge shall hear and examine the complainant and other parties who appear to support or resist the claim and examine the water commissioner or water commissioners and witnesses regarding the charges contained in the complaint.

(3) Upon the determination of the hearing, the [water](#) judge shall make findings and issue an order that the [water](#) judge considers just and proper. If it appears to the [water](#) judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, permit, certificate, or change in appropriation right, the [water](#) judge shall give the proper instructions for distribution of the water.

(4) The [water](#) judge may remove any water commissioner and appoint a new water commissioner if the [water](#) judge determines that the interests of the parties in the waters

mentioned in the decree, permit, certificate, or change in appropriation right will be best served by appointing a new water commissioner. If it appears to the [water](#) judge that the water commissioner has willfully failed to perform the water commissioner's duties, the water commissioner may be proceeded against for contempt of court, as provided in contempt cases. The [water](#) judge shall make an order regarding the payment of costs of the hearing that the [water](#) judge determines is just and proper."

{Internal References to 85-5-301:

3-7-311 85-20-1001}

85-5-302. Maintenance of headgates and measuring devices. All persons using water from any stream or ditch for which a water commissioner is appointed are required to have suitable headgates at the point where a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in the ditch. If a person fails to place or maintain a proper measuring appliance, it is the duty of the water commissioner not to apportion or distribute any water through the ditch. The commissioner shall notify all parties interested by certified mail or in person 1 week before making the annual repair or cleaning of a stream or ditch or performing necessary labor or expenses to divert water to a ditch. The sending of a certified letter to the last-known post-office address of any interested party is prima facie evidence of the fact that the party was duly notified. Any work in the way of repairing a ditch made necessary by an emergency may be done without notice when injury would result from a delay."

{Internal References to 85-5-302: None}

85-5-401. Determination of water rights between partners, tenants in common, and corporate stockholders. If a water ditch used for irrigating purposes is owned by a partnership, tenants in common, or corporation and there is any dispute between the respective owners, tenants in common, or stockholders respecting the use and division of the waters flowing in the ditch, any partner, tenant in common, or stockholder may commence an action in any court of competent jurisdiction to determine the rights of the respective parties to the use of the waters and may join in the petition a request for the appointment of a water commissioner to apportion and distribute the waters of the ditch according to the rights of the respective owners, tenants in common, or stockholders during the pendency of the action."

{Internal References to 85-5-401:

85-5-402}

85-5-402. Appointment of commissioner prior to final decree. After the filing of the complaint in an action under 85-5-401, the court may, upon 5 days' notice to the other parties to the action, appoint a commissioner to divide and distribute the waters of the ditch to the respective parties, according to their respective rights, during the pendency of the action. The court may, upon good cause shown, appoint a commissioner without notice, and when a commissioner is appointed without notice, any party to the action may, on 5 days' notice to the plaintiff, move the court or judge to vacate the appointment or to modify the order as to the distribution of the waters of the ditch. The court or judge, on hearing, may affirm, vacate, or

modify the order previously made. Each water commissioner appointed shall subscribe to an oath of office before commencing the discharge of duties."

{Internal References to 85-5-402: None}

85-5-403. Division of water. It shall be the duty of the water commissioner to divide the waters of said ditch between the owners, tenants in common, or stockholders in proportion to their respective rights, as set forth in the complaint or in such other manner or proportion as the court or judge may direct."

{Internal References to 85-5-403: None}

85-5-404. Authority of commissioner. Such commissioner shall have authority to enter upon said ditch; open, close, and set headgates; and do whatever else is necessary to apportion and distribute the waters of said ditch to the respective parties according to their respective rights."

{Internal References to 85-5-404: None}

85-5-405. Compensation and expenses. The court shall fix the compensation of the commissioner and the term of employment and shall make an order apportioning the amount of compensation among the several owners, tenants in common, or stockholders of the ditch, according to their respective rights and interest in the ditch. The amounts apportioned must be taxed as costs in the action against the respective parties."

{Internal References to 85-5-405: None}

85-5-406. Interference with actions of commissioner. A person opening or closing a headgate after being set by the commissioner or who in any manner interferes with the commissioner in the discharge of the commissioner's duties is guilty of contempt of court and may be proceeded against for contempt of court as provided in contempt cases."

{Internal References to 85-5-406: None}

85-5-407. Appointment of water commissioner after final decree. When the rights of the respective parties in an action to the use of the waters flowing in a ditch are adjudicated, the judge of the water court, upon the application of the owners of at least 10% of the waters of the ditch, may, in the exercise of the judge's discretion, appoint a water commissioner to divide, apportion, and distribute the waters of the ditch to the respective parties according to their respective rights as set forth in the decree. When a commissioner is appointed under the provisions of this chapter to apportion and distribute the waters of the stream from which the water flowing in a ditch is taken, the commissioner shall, when directed by the judge or court, apportion and distribute the waters of the ditch according to the decree by which the rights of the respective owners were adjudicated."

{Internal References to 85-5-407: None}

85-5-408. Apportionment of costs. (1) When a commissioner is appointed upon the application of an owner or owners of a ditch, the court may fix the compensation of the commissioner and the term of the commissioner's employment. The court shall make an order

apportioning the amount of compensation among the several owner or owners, tenants in common, or stockholders of the ditch according to their respective rights and interest. The order has the effect of a judgment against the person to whom the water was admeasured and for whose benefit it was used. When, in the discretion of the court, an order of apportionment of expense is made against the land for which the water was used, it has the effect of a lien against the land to which the apportionment was made. Execution may issue upon the order as upon a judgment by direction of the court, upon the application of any person interested in the order.

(2) When a commissioner is appointed under the provisions of this chapter to distribute the waters of the stream from which the waters flowing in a ditch are taken and to apportion and distribute the waters of the ditch according to the rights of the respective owners of the waters, the judge, in the judge's discretion, may, in addition to the apportionment taxed against the respective owners of the waters of the stream, apportion and tax the amount, if any, that the owners of the ditch shall pay in addition to the amount taxed under the provisions of this chapter."

{Internal References to 85-5-408: None}

2-4-702. (Temporary) Initiating judicial review of contested cases. (1) (a) Except as provided in 75-2-213 and 75-20-223, a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case is entitled to judicial review under this chapter. This section does not limit use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute.

(b) A party who proceeds before an agency under the terms of a particular statute may not be precluded from questioning the validity of that statute on judicial review, but the party may not raise any other question not raised before the agency unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.

(2) (a) Except as provided in 75-2-211, 75-2-213, and subsections (2)(c) and (2)(e) of this section, proceedings for review must be instituted by filing a petition in district court within 30 days after service of the final written decision of the agency or, if a rehearing is requested, within 30 days after the written decision is rendered. Except as otherwise provided by statute, subsection (2)(d), or subsection (2)(e), the petition must be filed in the district court for the county where the petitioner resides or has the petitioner's principal place of business or where the agency maintains its principal office. Copies of the petition must be promptly served upon the agency and all parties of record.

(b) The petition must include a concise statement of the facts upon which jurisdiction and venue are based, a statement of the manner in which the petitioner is aggrieved, and the ground or grounds specified in 2-4-704(2) upon which the petitioner contends to be entitled to relief. The petition must demand the relief to which the petitioner believes the petitioner is entitled, and the demand for relief may be in the alternative.

(c) If a petition for review is filed pursuant to 33-16-1012(2)(c), the workers' compensation court, rather than the district court, has jurisdiction and the provisions of this part apply to the workers' compensation court in the same manner as the provisions of this part apply to the district court.

(d) If a petition for review is filed challenging a licensing or permitting decision made pursuant to Title 75 or Title 82, the petition for review must be filed in the county where the facility is located or proposed to be located or where the action is proposed to occur.

(e) (i) A party who is aggrieved by a final decision on an application for a permit or change in appropriation right filed under Title 85, chapter 2, part 3, may petition the district court or the water court for judicial review of the decision. If a petition for judicial review is filed in the water court, the water court rather than the district court has jurisdiction and the provisions of this part apply to the water court in the same manner as they apply to the district court. The time for filing a petition is the same as provided in subsection (2)(a).

(ii) If more than one party is aggrieved by a final decision on an application for a permit or change in appropriation right filed under Title 85, chapter 2, part 3, the district court where the appropriation right is located has jurisdiction. If more than one aggrieved party files a petition but no aggrieved party files a petition in the district court where the appropriation right is located, the first judicial district, Lewis and Clark County, has jurisdiction.

(iii) If a petition for judicial review is filed in the district court, the petition for review must be filed in the district court in the county where the appropriation right is located.

(3) Unless otherwise provided by statute, the filing of the petition may not stay enforcement of the agency's decision. The agency may grant or the reviewing court may order a stay upon terms that it considers proper, following notice to the affected parties and an opportunity for hearing. A stay may be issued without notice only if the provisions of 27-19-315 through 27-19-317 are met.

(4) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be required by the court to pay the additional costs. The court may require or permit subsequent corrections or additions to the record. *(Terminates September 30, 2025-- sec. 6, Ch. 126, L. 2017.)*